In the

United States Circuit Court of Appeals

For the Ninth Circuit 7

No. 4501.

PORT GARDNER INVESTMENT COMPANY,
Plaintiff in Error

vs.

UNITED STATES OF AMERICA,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, DISTRICT JUDGE

Brief of Defendant in Error

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STATEMENT OF THE CASE

In this case while officers were searching certain premises under a Federal Search Warrant, the owner drove on to the premises in his Jewett Sedan,

which containd a five-gallon keg of moonshine whiskey.

The car was seized and the driver pleaded guilty to the possession and transportation of intoxicating liquor.

From a judgment of the District Court condemning said car and ordering it to be sold, an appeal has been taken by the assignee of the vendor of said automobile under a Conditional Sales Contract, claiming to be innocent of any wrong doing, and entitled to protection to the extent of his claim.

ARGUMENT.

In his argument counsel for appellant has set forth the position of appellant as well as that of the Government when he says that the desire of both parties is to settle on principle and on the merits rather than on minor details, the real question of this seizure, viz: will the circumstances surrounding this sort of seizure justify an absolute forfeiture under Revised Statutes No. 3450 of the Internal Revenue Laws, or must the Government confine itself under such circumstances to the forfeiture provided in the National Prohibition Act?

Appellant first contends that the allegations contained in the libel do not state a ground or cause for

a forfeiture under R. S. 3450; and that he is entitled to the protection afforded an innocent claimant as provided for under Section 26, Title II of the National Prohibition Act.

Inasmuch as the Government is confronted with this question daily, and in view of the ever increasing number of automobiles being seized, it is greatly interested in having its authority and limitations determined in this class of seizures.

The decisions of the various courts are not in harmony on this question, and until it is disposed of by the Supreme Court it will be an open question.

Section 26, Title II of the National Prohibition Act, provides as follows:

"When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle, team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. * * * * The court upon conviction of the person so arrested shall order the liquor destroyed,

and unless good cause is shown by the owner, shall order a sale by public auction of the property seized."

and then provides for allowance of claims of innocent claimants.

Section 3450 Revised Statutes, reads as follows:

"Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of, for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained such goods or commodities, respectively, and every vessel, boat, cart, carriage or other conveyance whatsoever and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited."

Section 35 of the National Prohibition Act provides as follows:

"All provisions of the law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein pro-

vided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve any one from criminal liability, nor shall this Act relieve any person from any liaiblity, civil or criminal, heretofore or hereafter incurred under existing laws."

Section 5 of the Act of November 23, 1891 (42 Stat. 222) known as the Willis Campbell Act, or Act supplemental to the National Prohibition Act, provides as follows:

"That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in confiict with any provision of the National Prohibition Act or of

this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in Section 35, Title II, of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor."

Section 600 (a) (40 Stat. 1057) (Act of February 24, 1919), provides as follows:

"There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in Section 604, in lieu of the internal-revenue taxes now imposed thereon by law, a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing laws."

Section 600, Title VI, Revenue Act of 1921 (Act of November 23, 1921) (42 Stat. 227) amending the last mentioned section, provides:

"That subdivision (a) of section 600 of the Revenue Act of 1918, is amended by striking out the period at the end thereof and inserting a colon and the following: 'Provided, That on all distilled spirits on which the tax is paid at the nonbeverage rate of $2.20 per proof gallon and which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, there shall be levied and collected an additional tax of $4.20 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon, to be paid by the person responsible for such diversion."

The actual enforcement of the National Prohibition Act had not been in progress very long until it was discovered that Section 26 of Title II of this Act, providing for the seizure and forfeiture of vehicles engaged in the illicit transportation of intoxicating liquor, was in its operation impracticable in many respects.

It permitted the owners of vehicles to so mortgage them or to transfer the titles thereto as to avoid forfeitures. It necessitated a conviction of a criminal charge before the forfeiture could be effected. This produced great delays with resultant accumulation of expensive storage charges while court action was being awaited. The long pending cases encumbered the dockets.

It was found that Section 3450 of the Revised Statutes was of a much more summary nature in that it did not afford opportunity for intervenors to come in and defeat the forfeiture and did not depend upon a criminal conviction, but effected prompt dispatch of cases brought thereunder and consequent relief of the dockets.

Therefore, the Government has been unwilling to concede that Section 3450 is no longer available for prohibition enforcement, but on the contrary has encouraged the use of it whenever possible, realizing, nevertheless, the nicety of the question.

There has been so many decisions upon both sides of this question that it is difficult to determine, without a careful examination of the authorities, where the weight of authority lies. The Government takes the view that there is very good reason for contending that Section 3450 is still in force. Whether or not Section 3450 has been superseded by the National Prohibition Act will of course be an open question until it is finally disposed of by the Supreme Court.

There can be no doubt about the power of the Government in the interests of the public revenue to condemn offending vehicles of transportation with-

out regard to the private rights and interests therein of the offending persons. This was definitely decided in the *Goldsmith-Grant Company* case, 254 U. S. 505.

This was a libel proceeding brought under Section 3450 for the forfeiture of an automobile used prior to the adoption of National Prohibition in the removal, deposit and concealment of nontaxpaid spirits. The vehicle was being operated by the purchaser. The Goldsmith Company intervened as owners under the terms of a conditional sale contract by which they had reserved title until completion of payment of the purchase price. They were in fact innocent of the unlawful use of the car and alleged that the taking of their property would be a violation of the Fifth Amendment.

But the Supreme Court held that Congress in enacting this statute treated the "*res*" as the offender and in providing so arbitrary a rule took into account the interest of the Government, its revenue and policies. This case was decisive as to the force and effect of Section 3450 in cases of removal and concealment of nontaxpaid intoxicating liquors. What it decided is so plain as to afford little excuse for argument. However, the probabilities are that the rule there promulgated

would not be applied in cases where the vehicle is operated by one who has stolen it, or is in possession of it without the express or implied consent of the owner. It should be borne in mind that this case arose before National Prohibition became effective, although it was decided after the adoption of the National Prohibition Act.

In this connection reference is made to the following decisions of similar import:

United States v. Mincey, 254 Fed. 287, C. C. A., 5th—November 8, 1918.

United States v. One Saxon Automobile et al, 257 Fed. 251, C. C. A., 4th—January 7th, 1919.

Logan v. United States—Wisdom et al v. United States, 260 Fed. 746, C. C. A., 5th —October 15th, 1919.

United States v. One W. W. Shaw Automobile Taxi and certain whiskey, 272 Fed. 491. District Court, Northern Ohio—May 20, 1921.

In the recent case of *United States v. One Studebaker 7-Passenger Sedan*, decided by this court on March 23, 1925, and unreported, it was held that a vehicle can be forfeited for the removal of a commodity upon which an internal revenue tax was

imposed with intent to defraud the United States of such tax.

It was not long after the National Prohibition Act became operative that the question arose whether the case continued to furnish a rule as to transportation on nontaxpaid liquors which were being illicitly removed, deposited or concealed.

It was said that Section 26 of the National Prohibition Act provided a distinct, full and complete rule and procedure for such cases and evinced an intention on the part of Congress to provide for such cases more elastic and equitable law than the Revenue Statutes.

The first important case to arise after the National Prohibition Act became operative, touching upon this question, was that of *Yuginovich v. United States*, 256 U. S. 450. It declared that Section 35, Title II, of the National Prohibition Act, superseded certain Internal Revenue Statutes providing public revenues out of distillery operations; that Section 35 providing penalties instead of taxes took the place of the Revenue Statutes. The decision was on June 1, 1921, prior to the Act Supplemental to the National Prohibition Act (42 Stat. 222), November 23, 1921, known as the Willis-Campbell Act.

United States v. Stafoff, Remus et al, 260 U. S. 477, involved statutes providing revenues out of the business of rectifying, wholesaling and retailing intoxicating liquors and raised the question whether the statutes were still operative in view of the provisions of the National Prohibition Act. The Stafoff case affirmed the Yuginovich case but avoided the effect of it by holding that the Yuginovich case states the law as it was during the interim between the adoption of the National Prohibition Act and the Supplemental Act, but that the Supplemental Act had the effect of re-enacting the statutes which the Yuginovich case held had been repealed and that the Yuginovich case therefore no longer states the law. Yet these cases are authority only by analogy and not decisive, because Section 3450 was not involved.

In the case *United States v. Stafoff*, 260 U. S. 477, p. 480, the court said:

"The decision in United States v. Yuginovich must stand for the law before November 23, 1921. In that case, besides what we have mentioned, it was held also that the penalty imposed by Rev. Stats. Sec. 3257 on a distiller for defrauding the United States of the tax on the spirits distilled by him was repealed. So far as the liquor is for beverage purposes the same reasoning must apply to the penalty in Sec. 3242 for carrying on the busi-

ness of rectifier or wholesale or retail liquor dealer without having paid the special tax imposed by law.

"But the Supplemental Act that we have quoted puts a new face upon later dealings. From the time that it went into effect it had the same operation as if instead of saying that the laws referred to shall continue in force it had enacted them in terms. The form of words is not material when Congress manifests its will that certain rules shall govern henceforth. Swigart v. Baker, 229 U. S. 187, 198. Of course Congress may tax what it also forbids. 256 U. S. 462. For offenses committed after the new law, United States v. Yuginovich cannot be relied upon."

The usual arguments against Section 3450 are (1) that distilled spirits are no longer subject to tax, and Section 35, Title II, of the National Prohibition Act of November 23, 1921, provide penalties in lieu of taxes; (2) that Section 26 of the National Prohibition Act covers the same ground as Section 3450 and provides a less harsh and more reasonable rule.

If there is a tax on illicitly distilled spirits then there may be a removal, deposit or concealment of the liquor to defraud the Government of the taxes thereon.

Aside from the question whether or not statutes enacted prior to prohibition and levying taxes

upon distilled spirits have been superseded or repealed by the National Prohibition Act, and the fact remains that Section 600 (a) of the Revenue Act of 1918 (Act of February 24, 1919), hereinbefore set forth, levies a tax upon such spirits.

Said Section 600 (a) was passed after the ratification of the Eighteenth Amendment to the Constitution on January 16, 1919. At that time Congress was giving serious consideration to the provisions of the proposed National Prohibition Act, which was adopted on October 28, 1919. There is no basis for contending that the above mentioned section of the Revenue Statutes was not intended to operate as to intoxicating liquors beyond the interim from its passage to the time that the Eighteenth Amendment should become operative. There was as much basis for it not being applicable to intoxicating liquors produced during that period as there is for holding it inapplicable to intoxicating liquors produced since the National Prohibition Act became operative, for the reason the War Prohibition Act (Act of November 21, 1918, 40 Stat. 1045), and the Food Control Act with its prohibitive features (Act of August 10, 1917, c. 53, 40 Stat. 282) were in force and effect and as a matter of fact had established prohibition, because it is im-

possible to produce distilled spirits without the use of food products that were prohibited by the Food Control Act. (See Section 3248 R. S.)

In *Hamilton, Collector, v. Kentucky Distilleries and Warehouse Company,* 288 Fed. 326, C. C. A., 6th, it was held that the tax imposed by said Section 600 (a) upon distilled spirits in bond payable when they are withdrawn is not in a technical sense a withdrawal, but is equivalent to "removed" and applies to spirits stolen from a bonded warehouse without the knowledge or consent of the owner.

That a tax is in fact imposed is supported by the following cases:

Yuginovich v. United States, 256 U. S. 450.

United States v. Stafoff et al, 260 U. S. 477.

Payne v. United States, 279 Fed. 112 (5 C. C. A.).

The Tuscan, 276 Fed. 55.

Maresca v. United States, 277 Fed. 727.

United States v. One Essex, 291 Fed. 479, 276 Fed 28.

United States v. One Cadillac, 292 Fed. 773.

Violette v. Walsh, 282 Fed. 582 (9 C. C. A.); also, 272 Fed. 1014 (D. C. Mont.).

Reo-Atlanta Co. v. Stern, 279 Fed. 422.

Goldberg v. United States, 280 Fed. 89 (5 C. C. A.

Parilla v. United States, 280 Fed. 761 (6 C. C. A.

Spirituous liquors become liable for the tax upon their production.

United States v. National Surety Company, 122 Fed. 904.

United States v. N. S. F. & G. Co., 220 Fed. 792.

Section 3246 R. S.

The Government does not wait to ascertain for what purposes intoxicating liquors shall be diverted before imposing the initial tax. This is partly for the reason that if illicitly used liquors should not be subject to tax then the law abiding producer would be burdened with a tax and his competitor, the illicit manufacturer, would profit by his own wrong so long as he was not detected. *United States v. Thompson*, 189 Fed. 838.

If illicit liquor is not subject to tax it is well to consider whether or not the bootlegger's unlawful income from illicit sales is subject to income tax in view of the conclusions reached in *Pollock*

v. Farmers Loan & Trust Company, 157 U. S. 429, 581, that where the source is not subject to taxation neither is the income.

The Circuit Court of Appeals for the Ninth Circuit in *Violette v. Walsh*, 282 Fed. 582, decided that a person engaged in the illicit manufacture of intoxicating liquors was not exempt from a tax assessment under the Revenue Act of February 24, 1919, 600 (a), imposing a tax on the manufacture of distilled spirits, in view of the provisions of Section 35, Title II, National Prohibition Act, that the act shall not relieve anyone imposing a tax on the manufacture of liquor.

It must not be overlooked that *general revenue laws are not superseded by subsequent statutes unless the later statutes specifically so provide. United States v. Barnes*, 222 U. S. 513.

The National Prohibition Act levies no taxes, therefore it cannot, as a taxing statute, supersede any of the Revenue Statutes. Section 35, Title II, imposes a penalty upon the unlawful manufacture or sale, but does not impose a tax upon production. It is a penalty for unlawful conduct rather than a contribution to the public revenue.

Fontenot v. Accardo, 278 Fed. 871.

The Tuscan, 276 Fed. 55.
United States v. One Essex, 291 Fed. 479.
Lipke v. Lederer, 259 U. S. 557.
Regal Drug Co. Case, 260 U. S. 386.
Ketchum v. United States, 270 Fed. 416.

Section 3450 is a law passed in the interest of the public revenue for the punishment of evaders of taxes, while Section 26 was enacted for the punishment of violators of prohibition engaged in the unlawful traffic in intoxicating liquors. The objects of said statutes are different, the subject matter largely different, and the *modus operandi* very much different. Section 3450 affects only untaxpaid liquors. It also operates upon a vehicle, although not in motion, used in the unlawful removal. It has no commiseration for the unoffending third party in interest. Section 26 applies to intoxicating liquors, regardless of taxes, transported in violation of the National Prohibition Act. The vehicle must be seized while in motion. The offending person must be convicted before the confiscation of the vehicle can be effected. As pointed out, Section 6 provides a very generous method for innocent owners and lien holders to come in and establish their claims.

Most of the courts holding that Section 3450 has been superseded by the National Prohibition Act, we think, have been influenced almost entirely in arriving at their conclusions by the fact that the National Prohibition Act provides a very humane method for third parties inetrested in the property to protect their interests. They do not approve of the harsh terms of the Revised Statutes and are glad of the opportunity to grant relief through the above mentioned generous provisions of the National Prohibition Act. However, in following this line of reasoning they overlook the fact that the Government has the power to provide for the forfeiture of the rights of the interested third parties in the manner provided in Section 3450. We need only point out, by reference to the *Mugler v. Kansas* case, 123 U. S. 623, the extreme to which the Government may go in the enforcement of principles of law for the general welfare. We have also pointed out that the Government may enact such extreme and arbitrary measures in the interest of the pulbic revenues as are essential to the operation of governmental functions.

Decisions of forfeiture arising under other statutes are not of much assistance in construing the force and effect of Section 3450. Many of the

other forfeiture statutes, particularly with respect to Maritime Law, because of the exigencies of the shipping business, are provided with safety valves similar to that found in the National Prohibition Act.

But ships may also be arbitrarily forfeited for carrying untaxpaid or unmanifested articles regardless of the guilt of the master, mate or owners of the vessel if the supreme government power sees fit in the interest of its revenue to provide for forfeitures in such cases. An old and leading case taking this view is *Mitchell v. Torup*, Parker 227. There a ship was importing 221 pounds of tea put on board in Norway by mariners on their own account without the privity of the master, mate or owners. The vessel was held forfeited under the terms of the provisions of the statute 12 Car. 2, c. 4 (Court of Exchequer, 1766). It was there held emphatically that the privity of the master was not necessary under the statute.

Therefore, the authority for the *Goldsmith-Grant Company* case goes back a long way into English jurisprudence.

CASES HOLDING SECTION 3450 NOT REPEALED.

The cases taking the view that Section 3450 and other Revenue Statutes not inconsistent with the National Prohibition Act have not been repealed or superseded by it may be grouped as follows:

Cases pointing out that the Revenue Statutes deal with different subjects than the National Prohibition Act and therefore are still in force:

United States v. Sylvester, 273 Fed. 253, District Court of Connecticut, March 8, 1921.

United States v. One Cole Aero Eight Automobile, 273 Fed. 934, District Court of Montana, June 28, 1921.

United States v. One Essex Touring Automobile, 266 Fed. 138, District Court, Northern District of Ohio, July 1, 1920.

United States v. Brockley, 266 Fed. 1001, District Court Middle District of Penna., Sept. 14, 1920.

United States v. One Essex Touring Car, 276 Fed. 28, District Court, Northern Georgia, August 8, 1921.

United States v. Sohm et al, 265 Fed. 910, District Court of Montana, July 12, 1920.

Payne v. United States, 279 Fed. 112, C. C. A., 5th, February 15, 1922.

United States v. DeLarge et al, 269 Fed. 820, District Court of Nebraska, February, 1921.

United States v. Freidericks et al, 273 Fed. 188, District Court, New Jersey, May, 1921.

Fontenot, Collector, etc., v. Accardo (and four other cases), 278 Fed. 871, C. C. A., 5th, February, 1922.

See also:

Goodfriend et al v. United States, 294 Fed. 148, C. C. A., 9th, December 17, 1923.

United States v. Story, 294 Fed. 517, C. C. A. 5th, November 30, 1923.

United States v. 385 Barrels of Wine, 300 Fed. 565, District Court of Southern New York, June 5, 1924.

Other cases holding that in view of the plain provisions of the Act Supplemental to the National Prohibition Act, the Revenue Statutes are in force or if they were repealed by the National Prohibition Act they haev been revived by the later statutes:

United States v. Torres, 291 Fed. 138, District Court of Maryland, July 24, 1923.

The Cherokee, 292 Fed. 212, District Court, Southern Texas, August 13, 1923.

United States v. One Ford Automobile, 292 Fed. 207, District Court, Southern Texas, August 13, 1923.

United States v. Knoblauch, 291 Fed. 407, District Court of Nebraska, July 30, 1923.

United States v. One Ford Automobile, Vol. 1 (2nd) Fed. 654, Eastern District of Tennessee, May 2, 1924.

United States v. One Bay State Roadster, 2 Fed. (2nd) 616, District Court of Connecticut, October 23, 1924.

United States v. One Ford Coupe; Same v. One Cadillac Roadster, 3 Fed. (2nd) 64, District Court, Western District of Louisiana, December 5, 1924.

United States v. One Durant Touring Car, 2 Fed. (2nd) 478, District Court, Western District of Texas, December 15, 1924.

A large number of decisions hold that intoxicating liquors are still subject to tax, although the National Prohibition Act regulates and prohibits:

United States v. One Essex Coupe, et al, 291 Fed. 479, District Court of Montana, August 1, 1923.

Payne v. United States, 279 Fed. 112, C. C. A. 5th, February 15, 1922.

Reo-Atlantic Company v. Stern, 279 Fed. 422, District Court, Northern Georgia, January 16, 1922.

United States v. One Ford Sedan, 297 Fed. 830, C. C. A. 5th, March 25, 1924.

The Tuscan, 276 Fed. 55, District Court, Southern Alabama, October 10, 1921.

United States v. One Cadillac Automobile, 292 Fed. 773, District Court, Eastern Illinois, October 1, 1923.

United States v. One Buick Roadster, 280 Fed. 517, District of Montana, April 28, 1922.

Bullock v. United States, 289 Fed. 29, C. C. A. 6th, May 8, 1923.

Hamilton v. Kentucky Distilleries & Warehouse Co., 288 Fed. 326, C. C. A. 6th, April 3, 1923.

Skilken v. United States, 293 Fed. 923, C. C. A. 6th, November 6, 1923.

Parilla et al. v. United States, 280 Fed. 761, C. C. A. 6th, May 12, 1922.

Lewis v. McCarthy et al, 274 Fed. 496, District Court of Massachusetts, June 15, 1921.

United States v. One Ford Automobile; Same v. One Ford Touring Automobile, 2 Fed. (2nd) 882, District Court, Western Tennessee, July 20, 1924.

In the case of *United States v. One Ford Automobile*, 2 Fed. (2nd) p. 882 at p. 884, the court said:

"It appears that the construction given the act of 1921 in the Stafoff case is that by its terms Congress has re-enacted those laws which had been held to be repealed by the cases above referred to as being in conflict with the National Prohibition Act, and that the latter act must now prevail, since the Supreme Court has held that by its provisions Congress has re-enacted the laws referred to therein as if the same had been set out in the latter act in terms. This was said without commenting upon the peculiar wording of section 5 of the Act of 1921. If this section should be construed literally as to what laws are re-enacted, it is meaningless and re-enacts nothing, since it is said that all laws in regard to the manufacture and taxation of and traffic in intoxicating liquors and all penalties for violation of such laws that were in force when the National Prohibition Act was enacted shall be and continue in force as to both beverage and non-beverage liquors 'except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this act.' (Italics mine.) The literal wording of this exception, as above stated, would re-enact nothing, for the reason that the National Prohibition Act repealed nothing except what was in conflict with it, and if such laws are not re-enacted by this later act, then section 5 loses force altogether and means nothing. If its words are to be literally construed, the holding in United States v. Lewis, supra, to the effect that Section 3450 has been repealed by Sec-

tion 26 of the National Prohibition Act as being in conflict with this latter section, would have section 3450 standing now repealed and the remedy sought by the Government in these cases could not be enforced. However, in construing section 5, as in all questions involving the construction of a statute, the primary object of inquiry is to determine the legislative intent as it appears from the act as a whole. Furthermore, it is a well-established rule that courts will give a meaning to legislative enactments where consistently possible, rather than to hold them meaningless. * * * By giving to section 5 the construction placed thereon by the Supreme Court in the Stafoff case then under the same reasoning heretofore applied by the courts which have held section 3450 repealed by section 26 of the National Prohibition Act, it would seem that section 26 of the *National Prohibition Act must now stand repealed in so far as there may be any conflict between it and section* 3450, *since section* 3450 *has been re-enacted by the act of* 1921. However, this question is not here determined, for the reason that it now appears to me the two sections may well stand without such a holding. * * * Granting this to be true, parties dealing in liquors unlawfully are now liable for a tax, and when Congress endeavors to pass an act in aid of existing laws, if it did not intend that the existing laws where not clearly in conflict with the later act should be repealed, it would seem that a construction should be placed upon the later act, which, if possible, would leave in force those laws which Congress sought to retain.

"The rule that repeals by implication are not favored is well known, and it is a well-established principle of law that a repeal by implication is never favored unless the statutes under consideration are so repugnant as to preclude any other conclusion. South Carolina v. Stoll, 17 Wall. 425, 430, 21 L. Ed. 650. The question does not stand as if Congress had contented itself in the National Prohibtiion Act, with a simple repealing clause. Surely it had some purpose in inserting the positive provisions referred to in section 35. It appears reasonable that in section 3450 in certain of its provisions could be left in force as not being directly antagonistic to the provisions of section 26, such construction should be placed thereon.

"If section 3450 has been destroyed by the National Prohibition Act and has not been revived by section 5 of the Act of November 23, 1921, the instant cases afford striking illustrations of a serious defect in section 26 of the National Prohibition Act, in that as this latter section has been construed it is necessary not only that the vehicle seized must have been so seized while being used in the very act of transporting intoxicating liquor, and that the government must go further, in that it must apprehend the party so using the vehicle and convict such party before the seized vehicle can be declared forfeited. It will readily be seen how easy it would be to evade this statute. The party in charge of the vehicle sought to be seized may abandon it while being pursued, escape the officers, and thus the Government be left to the necessity of merely confiscating whatever liquor

may be found in the vehicle and leaving it for the law violator to again use at his pleasure. Is this in keeping with the argument that it was the desire of Congress to absolutely prohibit all traffic in intoxicating liquors? Can it be said that the Congress of the United States could not foresee the ease with which this statute might be evaded? Is it not more reasonable that with this possibility in view Congress had in mind the fact that, if such vehicle should be abandoned by the law violator, the Government, under section 3450, would have its remedy, and that, inasmuch as section 3450 was broad in its provisions, Congress desired to leave it in force except where section 26 by unmistakable terms superseded some of its provisions or by this later act to re-enact it even at the expense of section 26? As has been pointed out in some of the decisions above mentioned, section 26 proceeds against the person, while section 3450 proceeds against the res. Furthermore, as just stated, under the construction placed upon section 26 it is limited to vehicles in motion; section 3450 covers vehicles not in motion. Under section 26 no forfeiture may be had unless the driver or owner is apprehended and convicted; under section 3450, this is not necessary. Under section 26, it is immaterial whether the taxes have or have not been paid if the liquor was being unlawfully transported; while under section 3450 tax-paid liquors, regardless of how they were being transported, could not be reached, and only untaxpaid liquors might be reached, and that where they were being so stored or concealed as that it was done with the intention of defraud-

ing the Government of the taxes due thereon. If Congress really intended the National Prohibition Act to stand, as it said, in aid of existing laws may it not now be said that by section 5, above quoted, it has endeavored to make provisions whereby that purpose may be carried out, and certainly it has manifested an intention that a statute shall not now stand repealed in aid of which the National Prohibition Act might so well be invoked in many instances, and is it not reasonable to assume that with the powers possessed by the government under section 3450, it was the intention of Congress by the enactment of section 5 of the act of November 23, 1921, to revive these powers as additional remedies to those provided by section 26 of the National Prohibition Act, if they have been repealed by that act, so that the storing or removing or concealment of untaxpaid liquors in vehicles such as are here in question would bring about a forfeiture of the vehicle in cases where the party could not be reached under the provisions of section 26, and so that a system might be established whereby almost any conceivable character of illegal traffic in liquors, for beverage or non-beverage purposes might be reached by statutory provisions, and the offender, whether it should be the person or the res, be made subject to the penalties or punishment provided. It occurs to me that any other construction would have the effect of destroying the remedies provided in these various sections rather than to have them stand in aid of each other."

In the case of *United States v. One White One-Ton Truck*, 4 Fed. (2nd) 413, at page 414, Judge Cushman said:

"It has been contended upon behalf of claimant, that the burden of showing a nonpayment of the tax rests upon libellant. These spirits were fit for beverage purposes, and contained one-half or more than one-half of one per cent, of alcohol by volume, the importation, manufacture, transportation, sale and possession of which are prohibited by the Volstead Act. Section 1, Par. 813, of the Tariff Act of 1923, 42 Stat. at Large, p. 898; Comp. Stat. Ann. Supp. 1923, Sec. 5841a, provides:

" 'No wines, spirits, or other liquors or articles provided for in this schedule containing one-half of 1 per centum or more of alcohol shall be imported or permitted entry except on a permit issued therefor by the Commissioner of Internal Revenue, and any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws.'

"The court takes judicial notice of the fact that the Commissioner of Internal Revenues will not issue such a permit for the importation of such spirtis into a state having what is popularly known as a 'bone dry' law, as has the State of Washington. Under such conditions there is no presumption warranted in law that spirits so seized have paid the tax; rather, the only presumption reasonably warranted is that the tax has not been paid.

"Section 3333, R. S.; Comp. Stat. Sec. 6130, provides 'Whenever seizure is made of any distilled spirits * * * in respect to which the owner or person having possession, control, or charge of said spirits, has omitted to do any act required to be done, or has done or committed any act prohibited in regard to said spirits, the burden of proof shall be upon the claimant of said spirits to show that no fraud has been committed, and that all the requirements of the law in relation to the payment of the tax have been complied with.'

"It is not necessary to determine whether this statute is applicable to a case as the present where a claim is made to the automobile and not the spirits. As the ordinary and natural result of the manner of carriage was to conceal from the officers of the internal revenue the nature of the article carried, and thereby hinder and prevent the collection of the tax due thereon, the presumption is warranted, in the absence of controverting evidence, that the deposit and concealment in the truck were with intent to defraud the United States of the tax which was due upon these distilled spirits, whether they were of domestic or foreign manufacture. United States v. Stafoff, supra; Goldsmith-Grant Company v. United States, 254 U. S. 505, 41 S. Ct. 189, 65 L. Ed. 376.

"Decree of forfeiture as prayed."

CASES HOLDING SECTION 3450 IS REPEALED.

The decisions holding that Section 3450 is not in full force have been decided from various viewpoints, namely:

That Section 26, Title II, of the National Prohibition Act covers the same ground as Section 3450 to such an extent as to make it clear that Section 26 was intended to supersede Section 3450:

United States v. One Haynes Automobile, etc., 268 Fed. 1003, District Court, Southern Florida, December 8, 1920.

Lewis v. United States, 280 Fed. 5, C. C. A. 6th, April 14, 1922.

United States v. One Packard Motor Truck, 284 Fed. 395, District Court, Southern Michigan, October 30, 1922.

Reed v. Thurmond, 269 Fed. 252, C. C. A. 4th, November 4, 1920.

United States v. Yuginni et al, 266 Fed. 746, District Court, Oregon, July 13, 1920.

That Section 26 not only substantially covers the same ground as Section 3450 as to intoxicating liquor, but provides a less harsh and more equitable

rule and therefore was intended to supersede Section 3450:

McDowell v. United States, 286 Fed. 521, C. C. A. 9th, February 5, 1923.

One Big Six Studebaker Automobile etc. v. United States, 289 Fed. 256, C. C. A., May 28, 1923.

United States v. One Paige Automobile, et al, 277 Fed. 524, District Court, Southern Texas, January 7, 1922.

See also *Lewis v. United States*, 280 Fed. 5.

Some of the courts have reasoned that Section 3450 is superseded by Section 26, because the latter statute provides a new method for handling illegal liquor transactions

Bruno v. United States, 289 Fed. 649, C. C. A, 5th, June 4, 1923.

United States v. American Brewing Company, 296 Fed. 772, District Court, Eastern Pennsylvania, February 15, 1924.

In re Food Conservation Act, 254 Fed. 893, District Court, Northern New York, December 26, 1918.

Other courts take the view that revenue statutes encourage production to increase the revenues and the National Prohibition Act discourages production of intoxicating liquors, and it would be incon-

sistent to hold that the revenue statutes were retained to aid prohibition enforcement:

United States v. Windham, 264 Fed. 376, District Court, Eastern South Carolina, March 16, 1920.

Ketchum v. United States and two other cases, 270 Fed. 416, C. C. A. 8th, February 28, 1921.

That in order for 3450 to apply there must be a tax due, and, because intoxicating liquors are no longer subject to tax, Section 26 supersedes Section 3450:

One Ford Touring Car et al v. United States, 284 Fed. 823, C. C. A. 8th, October 21, 1922.

United States v. One Haynes Automobile, 274 Fed. 926, C. C. A. 5th, July 25, 1921.

It is also reasoned that because intoxicating liquors are now contraband the procedure provided in the National Prohibition Act supersedes certain customs statutes:

The Goodhope, 268 Fed. 694, District Court, Western Washington, October 14, 1920.

In certain narcotic cases which are often cited in prohibition cases as authority and analogy, it is contended that 3450 does not apply to vest pocket narcotic peddling where an automobile aids in bringing the peddler to his customer, for the reason

there is not such a removal, deposit or concealment as Section 3450 contemplates:

United States v. One Cadillac Automobile, 2 Fed. (2nd) 886, District Court, Western Tennessee, May 28, 1924.

United States v. One 1920 Premier Automobile, 297 Fed. 1007, C. C. A. 9th, April 21, 1924.

United States v. One Kissel Touring Automobile, 289 Fed. 120, District Court of Arizona, May 9, 1923.

United States v. One Ford Automobile Truck (*United States v. One Paige Seven-Passenger Touring Autmobile*), 286 Fed. 204, District Court, Western Washington, January 12, 1923.

United States v. One Kissel Touring Automobile, 296 Fed. 688, C. C. A. 9th, March 3, 1924.

United States v. Magana, 299 Fed. 492, C. C. A. 8th, May 6, 1924.

United States v. One Haynes Automobile, et al, 290 Fed. 399, District Court, Northern California, June 15, 1923.

It has been decided recently that the removal in Section 3450 is not the same as the transportation in Section 26, Title II, of the National Prohibition Act, but means a removal from a fixed place of

production or the like to a place where the tax may be more easily avoided.

United States v. One Buick Automobile (3 cases), 300 Fed. 584, District Court, Southern California, July 22, 1924.

United States v. One Buick Sedan, 1 Fed. (2nd) 997, District Court, Southern California, October 4, 1924.

RESUME.

The above leading cases, bearing upon the question of the applicability of Section 3450 to transportation of nontaxpaid liquor since the adoption of Section 26 of the National Prohibition Act, show a decided weight of authority in favor of the continuance and advisability of Section 3450.

If the effect of the Yuginovich case was to hold that Section 3450 had been superseded by the National Prohibition Act, then the effect of the Stafoff case was to hold that such statutes were revived by the Act Supplemental to the National Prohibition Act.

The Goldsmith-Grant Company case decided that an automobile found transporting intoxicating liquor upon which no revenue tax has been paid (the transportation being such as would also be a

violation of the National Prohibition Act) was forfeitable regardless of the claims of the seller as owner under a conditional sale contract by which he retained title until completion of the purchase price. This case makes it clear that the third party's interests were secondary and junior to the Government's interest, on account of the public revenue. This decision is open to only one exception and that is where the vehicle is being used in violation of the statute by some one who has obtained it by fraud or theft.

It is insisted that by weight of authority Section 3450 has not been repealed or superseded by the National Prohibition Act; but on the contrary both laws are in full force and effect, and that in seizures of the class herein involved, if an automobile is seized while in motion it may be forfeited under either section. If the car is not in motion, it may be forfeited only under Section 3450.

II

In this case the evidence on the part of the Government showed that one Nadeau, the contract purchaser of the car, told the officers before they searched the car, that he had moonshine whiskey in the car; that he owed about $700.00 and had

been bootlegging trying to earn enough to pay for the car (Tr. 32); that no tax had been paid on this liquor either to the Collector of Customs or Collector of Internal Revenue for the District of Washington.

The driver, Nadeau, took the stand and testified that he had purchased the liquor from a man whom he had met for the first time on the previous day, that he did not know his name; that the liquor was sold and delivered to him at some place on the highway. (Tr. 70.)

Appellant contends that Nadeau was guilty only of transportation of moonshine liquor and was under no duty to pay any tax—that there is no tax due upon the liquor and no place to pay it.

It has been pointed out that this Court has held that a tax can be assessed against illicit liquor, *Violett vs. Walsh*, 282 Fed. 582.

Section 35 of the National Prohibition Act provides that no one shall be relieved from paying taxes upon the manufacture or traffic in such liquor.

Nadeau not only transported the liquor, but had deposited and concealed it (non-tax paid liquor), in his car to defraud the Government of the tax due upon it.

The purchase of the liquor upon the highway, his traffic in intoxicating liquor, and all the surrounding circumstances as well as his admissions to Government agents, were sufficient to justify the jury in finding that an intent to defraud the Government of a tax existed.

The burden was upon him under 3333 R. S. to show that no fraud had been committed and that all of the requirements of the law in relation to the payment of the tax had been complied with—this he failed to do.

Appellant's contention that the prosecution of the driver, Nadeau, for transportation bars this action under 3450.

The count in the information charging unlawful transportation, did not specify this car by name or description.

There is no question as to the authority of the Government to have described the car and forfeited same in proceedings incidental to the criminal action.

The question for decision here is: Was the Government compelled to follow that course, or did it have the right to an election of remedies.

The Government insists that inasmuch as these liquors were non-tax paid, two laws were violated, and that the right of election existed.

This is not a case where an innocent man had been employed to haul liquor, or some other situation where no evasion of the revenue laws could be imputed to the driver or owner, but that of a bootlegger knowingly, depositing and concealing liquor in his car and knowingly violating two laws.

It would be just as consistent to say that a man could not be prosecuted for operating a still under the revenue laws because the National Prohibition Law prohibits the same thing and *provides a lesser penalty*, whereas, the *Staffof* case has said that he can be prosecuted under either.

Under Section 26, the person is tried—under 3450, the automobile is on trial. Both laws have been violated and conviction under one is not a bar to conviction under the other.

Congress has sought to preserve the Revenue Laws by direct legislation and has done so as effectively as if it had re-enacted those laws in so many words. It is not in the province of the courts, by the use of unnatural, unusual and an artificial display of words to undo its clear legislative intent.

The Collector of Internal Revenue is authorized and directed to collect taxes upon intoxicating liquors, in no uncertain words, in the Act of November 23, 1921, when Congress knew of the overlapping provisions in the various laws and of all the obstacles and difficulties lying along the road of Prohibition enforcement.

It is most earnestly contended that 3450 R. S. and Section 26 do not conflict but are consistent with each other; and that one act may constitute a violation of both laws and that the Government may elect to proceed under either law.

Respectfully submitted,

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